

Remarks of Chief Justice Broderick
to NY State Judicial Education Program
Rye Brook, NY, June 25, 2008

This past February I flew very early one morning to Washington to attend a memorial service on Capitol Hill for a friend, who was also a distinguished member of Congress. Someone I revered.

My cabdriver that morning was as pleased to see me, as I was to see him. Business at Reagan at that early hour was slow and cabs were scarce. As we drove across the Potomac, we continued to talk and he began telling me his story.

Although he spoke with a thick accent, he had been in the United States for almost twenty-five years. He had two daughters who were just children when they arrived here. He now had a granddaughter. He was one proud grandfather. At a stoplight he passed me her picture. She was just as adorable as he said. I told him I had granddaughters, too. We had found common ground.

“My grown children,” he said, “are well educated and have very good jobs.” He was proud of them. Mostly, he said, he was proud to be an American. “This is the greatest country on earth,” he told me forcefully. “The very best. I’m from the Balkans, and my daughters’ lives here have been so much better. They have been given so much. I love the American people.”

As we turned onto Pennsylvania Avenue with the Capitol Rotunda in the distance, he asked me what I did for a living. I told him I was a judge, an appellate judge. “You have the most important job in your entire government,” he exclaimed, his voice rising and full of admiration. “Your job makes America, America.” I asked him what he meant and why he felt that way. “Courts protect people from government, particularly from its abuses,” he told me. “Without judges,” he said, “little people like me could never be sure if they were really safe, really equal or really free.” A few minutes later, he dropped me near the Capitol. After I paid him, he stretched his right arm over the seat between us to shake my hand. “Good luck to you,” he said, with a wide smile, “it has been an honor to have you in my cab. A real honor.”

I had a little time before I needed to be in Statuary Hall so I walked around the block lost in thought. I had been very touched by the cab driver’s words and by his simple wisdom. My walk took me past the United States Supreme Court. It was still early and there weren’t many people on the sidewalk. So I stopped just to take it in.

As I stood there that morning gazing at the front edifice of the Court, I wondered what American life would be like without it, how the history of the Twentieth Century might have been different if it did not exist and how the real promise of our country could ever be assured without an independent, accessible

judiciary. The cab driver this day had put a face on it for me. A very human face. And a very grateful one, too.

After a minute or two, I crossed the street and followed a marked path to the Capitol, just a few hundred yards away. The Congressman, whom I was there to honor that cold winter morning, had survived the Holocaust as a Hungarian Jew. He had been held in forced labor camps and finally escaped. He then worked for the underground before he emigrated to the United States. He arrived here penniless. Through hard work and the generosity of the American people, he got a PhD in Economics.

He was the only Holocaust survivor ever to serve as a member of Congress. He knew firsthand what it was like when no one was there to stop the trains in the middle of the night. The Nazis killed his mother and much of his family. The storied and distinguished life of Congressman Tom Lantos was testament to what the cab driver had told me and to the fundamental obligation of the American justice system.

In our country, the greatest nation in the world, rights matter. Everyone's rights, no matter their station in life, no matter their income. No matter their circumstances. Guaranteed rights are fundamental to the American identity, fundamental to its core values. That belief is part of the social compact. It's integral to our Constitution. It's even chiseled above the threshold of our nation's highest court: "Equal justice under law."

It's something all of us learned in school and sometimes in church or synagogue. We all grew proud of it before we really knew what it meant or how special it was. It's what American soldiers have died for and one of the many reasons we honor their service. It's part of our pledge of allegiance: "With liberty and justice for all." It's what many of us get up each day to try to ensure. But I wonder at times if we are keeping the faith and whether we really mean it?

After nine years of service on the Board of the National Legal Services Corporation watching federal dollars for the poor grow smaller each year and their rights to legal counsel more restricted, and twelve years of service as an appellate judge, I ask myself some days whether "equal justice under law" represents a real commitment or merely an aspiration. I wonder if my cab driver gave me more credit that February morning than I deserved and whether I should be doing more to keep his trust by doing everything in my power to ensure more meaningful access to the courts for the disadvantaged. So, when you were kind enough to invite me to New York to speak about access to justice, I was delighted to accept. For myself and for my cabdriver.

The single biggest challenge confronting the state courts in America, in the first decade of this new century, is the rising number of self-represented litigants. They enter our courthouses in increasing numbers and compound our dockets. In my state there is an ever-rising tide of self-represented litigants in all our courts and

yesterday's answers are not enough. Sadly, there are not enough Legal Services Lawyers to go around.

The self-represented are no longer just the poor, but their ranks now include more members of the middle-class and a rising number of small businesses. The vast majority of the self-represented enter our courthouses without lawyers because they can't afford one, not because they don't want or need one. It's not their fault and the justice system in America has an obligation to respond. Doing nothing will not diminish their growing number or ensure justice for those already in the system. The court system in this country belongs to the people, all the people, and it is our responsibility to make it work, not just for the wealthy and well connected, but for everyone. If we are to deal effectively with this growing challenge, we need to take a new look, a fresh look, at how we do business and how staff and judges interact with the self-represented. To do anything less would not keep faith with the principles that brought all of us here this morning.

The simple truth is that more and more parties are coming to court alone at the same time more and more lawyers are becoming too expensive. Neither trend is helpful. When I have occasion to speak to groups of lawyers in my state, I often ask them to answer two simple questions privately. Could you afford to hire yourself and for how long? I usually get a number of knowing smiles. The decline in meaningful access to justice is everyone's problem and it can only be solved with everyone's help.

For too long and for too many reasons, too many have remained silent or turned away. It is my firm belief that the public will not long entrust its confidence to a system of justice it often cannot navigate, afford or understand.

I believe that courts need to speak with a louder voice and that judges, in particular, need to be heard. If those who preside in our courtrooms do not take a laboring oar on the issue of meaningful access to justice, then we cannot complain when others don't. If we as judges do not press the bar to step up, the courts to change and the legislative and executive leaders in this country to join us, we will surely fail. Silence is not our friend nor is it mandated by any ethical code that governs our conduct. We are all free to speak and write on issues affecting the administration of justice and more importantly, it is, in my judgment, our fiduciary obligation to do so.

In early 2006, I met at the Supreme Court with the managing partners of the thirty largest firms in my state to ask them to renew their firm efforts on pro bono. I also invited myself to visit eighteen law firms for lunch with their lawyers. I think it helped and many lawyers and firms responded. The New Hampshire Bar has a proud history of commitment to access to justice issues so it is hard to ask for more. But I did and more is happening. But I will need to stay after it.

It is particularly difficult to ask lawyers to volunteer their time in a worsening economy, but IOLTA revenue is down and the needs of the poor are increasing. We have to ask, but we also need to recognize those who respond.

Continued silence will not make needed change happen. Only awkward moments, public pressure, civic involvement and forceful persistence can do that. We need to find new and different ways to broaden public understanding of the growing crisis in the state courts and we need to do a better job enlisting public support. Most importantly, we need resources--for the legal services offices and community and for the state courts. We also need more aggressive debt forgiveness for lawyers willing to dedicate a credible portion of their professional lives to assisting the poor.

We need to do all we can as often as we can to ensure that the people and the politicians across this country are as concerned publicly about universal access to justice, as they are about universal access to healthcare. We can start at home. A few years ago, our Supreme Court appointed a Citizens Commission to examine the New Hampshire state courts. Most of the members and the two co-chairs were lay people. In frugal New Hampshire, the Citizens Commission recommended that our state “examine the expansion of legal representation to civil litigants unable to afford counsel and study the implementation of a civil Gideon” for the poor threatened with the losses of shelter, sustenance, safety, health and the custody of a child. They intuitively understood that on legal matters of critical importance, every citizen should have an advocate. Every citizen. Its realization is still distant but the need has been recognized. It’s a good beginning. In New Hampshire, I am proud to report that our legislature is stepping up. In the last few years, it has provided funds to New Hampshire Legal Assistance to allow it to open new offices in Littleton, Nashua and Concord. More needs to be done, but it is an impressive beginning.

I believe the American people and the legislators who represent them will do more to assist if the issues that brought us here today were made to resonate with them. That can’t happen, however, unless we capture their attention.

State access to justice commissions are a critical first step. They need to fairly assess the unmet needs in their states, ensure coordination and cooperation by the legal services community in the intake and delivery of legal services and they need to both reach out and speak out. In my judgment, every access to justice commission should issue an annual report card on the status of justice for the disadvantaged in their state. They should seek press coverage and editorial board opportunities. Each Supreme Court should annually and publicly recognize a person or firm who has taken a leadership role in addressing the access to justice challenge. Every Chief Justice, who has the opportunity to address a joint session of their state’s legislature, should press the issue of the growing challenge posed by self-represented parties. When I last had the privilege to speak to our Legislature, I asked for more help. Sooner, as opposed to later.

I would also like to see the Conference of Chief Justices, of which I am privileged to be a member, speak out as an organization each year on these issues. It would seem to me that the voices of the fifty Chief Justices in America would be hard to ignore. I would propose that Chief Justices in various regions of the country select

one of their members to speak annually, if allowed, at the regional conference of their Governors. I would also suggest that the President of the Conference of Chief Justices should look for an opportunity annually to address the American Bar Association at its convention, the National Governors Association and the National Association of State Legislators on the status of state court justice and the growing challenges it faces.

We need to find and encourage national voices for the poor. Not that many years ago United States Senator Warren Rudman from New Hampshire was a strong voice for fundamental fairness and access. The void left by his voluntary departure from the Senate has not been filled. I fear that America's promise of equal justice under law is not being kept. We need ongoing, high level open discussion at both the state and federal levels of a problem too often left unaddressed in the shadows. The poor need a national champion and we need to help find one or grow one.

A critical component of change, essential if we are to effectively meet the challenge posed by the growing number of self-represented parties, is for courts to self-examine how they do business and why. Courts need to constantly examine and re-examine how their service is provided and whether process can be streamlined to both reduce delay and cut costs for those who use their invaluable services. It's hard for me to believe that if we were designing our court system from scratch today, to deal with the realities on the ground, that we would create the exact same model with the exact same paperwork.

In this new century, which is moving at the speed of light, we need more and better technology in our state courts and a competitive mindset to match it if we are to do the public's business. We need more public access terminals and user-friendly technology. We need self-help centers, on site and offsite. We need world-class self-help websites. We need to streamline both process and procedure and be bold enough to ask if every dispute in our system is best suited to the adversary process, at least in the first instance.

We need more, not less, mediation in our courthouses. We need off-ramps for those who want them. We need to treat our staff as our most valuable resource and advocate for fair wages and benefits where they don't exist. It is unlikely we can successfully serve the needs of the self-represented without skilled staff behind the counters, on the phones and in our courtrooms. Quality staff is key to any long-term solution and they deserve our full support.

Judges will also have to grow more comfortable with the notion of "neutral engagement" and be prepared to be more proactive and more explanatory in their courtroom protocols and in their rulings. We need to amend our Judicial Conduct Codes to make "neutral engagement" less stressful and more the norm than the exception. A few months ago several of us from New Hampshire, along with judges and senior staff from thirty-seven states, attended a multi-day conference at Harvard Law School to discuss and examine a teaching curriculum for judges for dealing with the self-represented. It offers much promise. Judges have a key role to play in

changing and shaping the justice system of the 21st century to meet its expanding obligations. We need to be bold enough to redesign America's courts from the front door to the judge's bench while ensuring that parties get all the process they're due but not more than they need.

If we do not more aggressively and more publicly address the challenges of the self-represented to the fair, timely and impartial administration of justice in America's courthouses, be assured there will be unintended collateral consequences. None are helpful and none are inevitable if we choose to act. If we do not act, I am concerned that within a decade state courts will be largely for the poor and for those charged with a crime. If that occurs, some legislators might wonder if we need the same money we used to receive when our users were more diverse. Many in the business community, who advocate for us now, may no longer come to our front doors but rather race in increasing numbers to the flourishing private justice system in America. If change does not happen, I wonder whether we will attract the best and brightest lawyers to preside in our courts. But most of all, I am concerned we will lose or at least continually diminish what makes America, America, as my cabdriver would say.

Equal justice under law is not achievable if poverty or limited resources effectively barricade the doors to our courthouses and do not allow a growing segment of our population a fair, understandable, affordable and impartial forum for resolution of their disputes. How would you feel if we had a system in this country where, if you went to an emergency room with severe abdominal pain, without insurance, you were told to use the illustrated textbooks on the bookshelves to diagnose your problem and the sterilized instruments in the trays to perform your own surgery? All of us would think that system immoral. Somehow, when mothers or fathers are told to fight for custody of their child or for their health care, their job, their apartment or their home without a lawyer, too many think it's perfectly alright for them to perform their own surgery in our courthouses with burdens, rules and process they do not understand. Well, it isn't all right and we shouldn't tolerate it in the greatest justice system in the world. As a nation, we should expect better and as a people we can do better. If the courts cannot work for my cabdriver, they will soon enough defy the promise of the Framers. Justice isn't just a nice idea; it's the glue that keeps our democracy together.

Let me close with a brief story. In my first year on the Supreme Court, I got a call one morning in my chambers from a woman I didn't know. She was quite distraught. I could barely hear her because of annoying background noise. When I asked her where she was, she angrily replied, "I'm on a sidewalk in Nashua with my two children. I need your help." Thinking she had dialed a wrong number, I told her I was a judge and really couldn't be giving her advice. "I know you're a judge," she said with a rising voice. "Why do you think I called you?"

"What's your problem, ma'am," I asked. "I'm being evicted from my apartment," she said. "I have no money and my kids and I will be on the sidewalk. I don't think my landlord can do this to me." "Ma'am," I replied, "you should probably

go over to the district court. Maybe they can help you. Maybe they can find you a lawyer.” By this point, she was screaming into the phone, although I could hear her children crying in the background. “I didn’t think you’d understand,” she yelled in an exasperated voice. “You’ve never been poor and you’ve never been homeless.” She was right. She slammed her receiver down.

The desperation in her voice haunts me still. That call was over twelve years ago and I wonder what became of her and her children. But I am certain of this. The justice system in this country should afford everyone meaningful access, dignity and opportunity, even if they lose. Even if they’re poor. Especially if they’re poor.

I would like it said years from now that during our collective watch no one was turned away and that the dignity of all who sought justice was respected and that the courts were truly open. If we work together, if we all strive harder—and collaborate with others, all things are possible. If nothing changes, the justice system will be less respected and rendered less relevant to more and more of our citizens. In my judgment no one wins if we let that happen. The choice is ours and both public trust and personal pride demand that all of us do more. Impatience is our best friend, honesty our best weapon and success our obligation. We have no time to waste. Thank you for listening and for all you do to make America, America.